IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL MISC.APPLICATION No. 5100 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE M.R. SHAH

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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JITENDRA M.PAREKH & 1 - Applicant(s)
Versus
STATE OF GUJARAT & 1 - Respondent(s)

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Appearance :
MR RR TRIVEDI AND MR BHAVESH P TRIVEDI for Applicant(s) : 1 - 2.
MR RC KODEKAR, ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,
None for Respondent(s) : 2,

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CORAM : HONOURABLE MR.JUSTICE M.R. SHAH

Date : 13/07/2007

ORAL JUDGMENT

1. By way of this application under Section 482 of the Criminal Procedure Code, the applicants – original accused Nos. 3 and 5, the partners of

Mansukhlal Gordhandas Parekh – partnership concern, have prayed to quash Criminal Complaint No. 4948 of 2006 pending before the learned Judicial Magistrate First Class, Ahmedabad (Rural).

2. That a criminal complaint has been filed by the respondent No.2 original complainant in the Court of Judicial Magistrate First Class, Ahmedabad (Rural) against the original accused No.1 Mansukhlal Gordhandas Parekh – partnership concern and other co-accused being partners of the said partnership firm for the offence punishable under Section 138 read with Section 141 of the Negotiable Instrument Act (for short “N.I.Act”) and under Sections 406 and 420 of the Indian Penal Code (for short “IPC”). The applicants are original accused Nos. 3 and 5 being partners of the aforesaid original accused – partnership concern. It is alleged in the complaint that an amount of Rs.8,88,000/- was given by the complainant to the firm by way of loan and on asking and demanding repayment, accused agreed and were ready to pay back the entire consideration by executing covenant of dissolution dated 27.06.2005

and the aforesaid amount of Rs.8,88,000/- was paid by the original accused more particularly by drawing various cheques. It is alleged in the complaint that the aforesaid cheques were handed over by the accused by signing in presence of complainant and return the debt by cheques with a specific understanding that the aforesaid cheques shall be realized. It is averred in the complaint that on its presentation of first two cheques of Rs.1 lac each, he received the payment through banker of complainant, thus sum of Rs.2 lacs has been received by the complainant amongst the aforesaid cheque amount. It is further averred that before the complainant deposited the rest of the cheques for its payment, accused approached the complainant and requested *vide* letter dated 27.12.2005, that the accused did not receive payment as expected and sought extension in re-payment of the amount till 15.03.2006 instead of 29.12.2005. That thereafter, the complainant deposited cheques bearing Nos. 007665 and 017959 dated 15.03.2006 drawn Development Credit Bank, Rajkot Branch for Rs.1,00,000/- and Rs.38,000/- respectively on 01.05.2006. However, said cheques

have been returned by the Bank with an endorsement “Payment Stopped by Drawer”. It is averred in the complaint that thereafter, statutory notice as required under the provisions of the Negotiable Instrument Act was issued and in spite of receipt of the same, payment has not been paid by the accused persons within stipulated time and therefore, the complainant has preferred the aforesaid complaint and the learned trial Court has issued summons against all the accused inclusive of the petitioners for the offence punishable under Section 138 of the Negotiable Instrument Act. Being aggrieved and dissatisfied with the same, the applicants – original accused Nos. 3 and 5 have preferred the present application under Section 482 of the Criminal Procedure Code to quash aforesaid complaint.

3. Shri Trivedi, learned Advocate appearing on behalf of the applicants has vehemently submitted that no case is made out against the applicants holding the applicants vicarious liable under Section 141 of the Negotiable Instrument Act. It is submitted that merely as the applicants were partners they

cannot be held vicarious liable. It is submitted that in view of the judgment of the Hon'ble Supreme Court in the case of ***Sarojkumar Poddar V/s. State (NCT of Delhi) & anr.*** reported in *2007(2) Scale 36* and the decision of the Hon'ble Supreme Court in the case of ***S.M.S. Pharmaceuticals Ltd. V/s. Neeta Bhalla & Anr.*** reported in *(2005) 8 SCC 89*, impugned complaint is required to be quashed and set aside. It is submitted that to attract the provisions of Section 141 of the Negotiable Instrument Act, it is necessary to specifically aver in the complaint that how the other partners are involved in the day to day activity of the company and without making any averment no any vicarious liability can be fastened on the present applicants. It is further submitted by him that other co-accused and original accused against whom summons were issued by the trial Court in the complaint in question, approached this Court by filing Criminal Misc. Application No. 12309 of 2006 and the learned Single Judge of this Court *vide* order dated 22.03.2007 has been pleased to quash and set aside the complaint in question so far as those partners are concerned. Therefore, it is requested to

allow the present application and quash and set aside the Criminal Complaint No. 4948 of 2006 *qua* the applicants.

4. On the other hand, learned Additional Public Prosecutor has submitted that there are requisite averments in the complaint to the effect that all the accused were in day to day activity. It is submitted that the learned Single Judge while allowing the Criminal Misc. Application No. 12309 of 2006 has relied upon the decisions of the Hon'ble Supreme Court (1) S.M.S Pharmaceuticals Ltd. (supra) and (2) Sarojkumar Poddar (supra). However, subsequently, the Hon'ble Supreme Court in the case of ***N.Rangachari v/s. Bharat Sanchar Nigam*** Limited reported in *AIR 2007 SC 1682* has clarified and/or further explained the aforesaid decisions and has held that “all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs” and that the question whether the petitioners were in charge of the partnership firm / concern at the relevant can be adjudicated during trial, and, therefore, complaint

is not required to be quashed under Section 482 of the Criminal Procedure Code and requested to dismiss the present application.

5. Heard the learned Advocates appearing on behalf of the respective parties.

6. The petitioner -original accused Nos. 3 and 5 are the partners of the original accused – partnership concern. It is an admitted position that the cheques have been issued by the partnership firm/ partnership concern and the said cheques are dishonoured by the Bank with an endorsement ““Payment Stopped by Drawer”. There are specific averments in the complaint that accused No.1 is the partnership concern headed and managed by accused Nos. 2 to 7 as partners. It is further averred in the complaint that the accused are the drawer of the said cheques within the meaning of Sections 138 and 141 of the Negotiable Instrument Act and the complainant is the payee of the instrument as per the Negotiable Instrument Act. It is further averred that the partners of the said Company be held guilty as they were handling day to

day affairs, they had sufficient knowledge about family business concerned. Now in the back drop of the same law on the point is required to consider.

7. Learned Advocate appearing on behalf of the petitioners has relied upon the decisions of the Hon'ble Supreme Court (1) S.M.S Pharmaceuticals Ltd. (supra) and (2) Sarojkumar Poddar (supra) as well as the decision of the learned Single Judge of this Court dated 22.03.2007 passed in Criminal Misc. Application No. 12309 of 2006 wherein *qua* other co-accused impugned complaint came to be quashed and set aside.

Now so far as the order dated 22.03.2007 passed by the learned Single Judge of this Court in Criminal Misc. Application No. 12309 of 2006, relied upon by the learned Advocate appearing on behalf of the petitioners is concerned, it is to be noted that the learned Single Judge has relied upon the decisions of the Hon'ble Supreme Court (1) S.M.S Pharmaceuticals Ltd. (supra) and (2) Sarojkumar Poddar (supra). However, it is to be noted that both

the aforesaid decisions came to be considered by the Hon'ble Superme Court recently in the decision of ***N.Rangachari V/s. Bharat Sanchar Nigam Limited*** reported in *AIR 2007 SC 1682* and the Hon'ble Supreme Court has further explained the aforesaid two decisions. In the case of N.Rangachari (*supra*), the Hon'ble Supreme Court after considering the aforesaid decisions in para Nos. 14,15 and 16, has observed as under:

> *"14. A person normally having business or commercial dealings with a company would satisfy himself about its creditworthiness and reliability by looking at its promoters and Board of Directors and the nature and extent of its business and its Memorandum or Articles of Association. Other than that, he may not be aware of the arrangements within the company in regard to its management, daily routine, etc. Therefore, when a cheque issued to him by the company is dishonoured, he is expected only to be aware generally of who are incharge of the affairs of the company. It is not reasonable to expect him to know whether the person who signed the cheque was instructed to do so or whether he has been deprived of*

his authority to do so when he actually signed the cheque. Those are matters peculiarly within the knowledge of the company and those in charge of it. So all that a payee of a cheque that is dishonoured can be expected to allege is that the persons named in the complaint are in charge of its affairs. The Directors are prima facie in that position.

15. In fact, in an earlier decision in Monaben Jetanbhai Shah & Anr. V/s. State of Gujarat &Ors. [(2004) 7 SCC 15], two learned Judges of this Court noticed that: "The laudable object of preventing bouncing of cheque and sustaining the creditability of commercial transactions resulting in enactment of Sections 138 and 141 has to be borne in mind".

16. In the light of the ratio in S.M.S.Pharmaceuticals Ltd.(supra), what is to be looked into is whether in the complaint, in addition to asserting that the appellant and another are the directors of the company, it is further alleged that they are incharge of and responsible to the company for the conduct of the business of the company. We find that such an allegation is

clearly made in the complaint which we have quoted above. Learned Senior Counsel for the appellant argued that in Saroj Kumar Poddar case (supra), this Court has found the complaint unsustainable only for the reason that there was no specific averment that at the time of issuance of the cheque that was dishonored, the persons named in the complaint were incharge of the affairs of the company. With great respect, we see no warrant for assuming such a position in the context of the binding ratio in S.M.S. Pharmaceuticals Ltd. (supra) and in view of the position of the Directors in a company as explained above. "

The Hon'ble Supreme Court in the said decision in Para 18 has held and observed as under:

"18. In the case on hand, reading the complaint as a whole, it is clear that the allegations in the complaint are that at the time at which the two dishonored cheques were issued by the company, the appellant and another were the Directors of the company and were incharge of the affairs of the company. It is not proper to split hairs in reading the complaint so as to come to a conclusion that the

> *allegations as a whole are not sufficient to show that at the relevant point of time the appellant and the other are not alleged to be persons incharge of the affairs of the company. Obviously, the complaint refers to the point of time when the two cheques were issued, their presentment, dishonour and failure to pay in spite of notice of dishonour. We have no hesitation in overruling the argument in that behalf by the learned Senior Counsel for the appellant."*

8. Now considering the recent decision of the Hon'ble Supreme Court in the case of N.Rangachari (*supra*), the prayer of the petitioners to quash the complaint relying upon the decision of the Hon'ble Supreme Court (1) S.M.S Pharmaceuticals Ltd. (supra) and (2) Sarojkumar Poddar (supra) and the decision of this Court passed in Criminal Misc. Application No. 12309 of 2006, cannot be accepted. Considering the averments in the complaint as stated herein above, as well as the recent decision of the Hon'ble Supreme Court in the case of N.Rangachari (*supra*), the question whether the petitioners were in charge of the partnership firm / concern at the relevant time is a defence, which is required to be adjudicated

during trial. Therefore, the present complaint is not required to be quashed in exercise of powers under Section 482 of the Criminal Procedure Code.

9. For the reasons stated above, the application fails the same is required to be dismissed and accordingly it is dismissed.

[M.R.Shah, J.]

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